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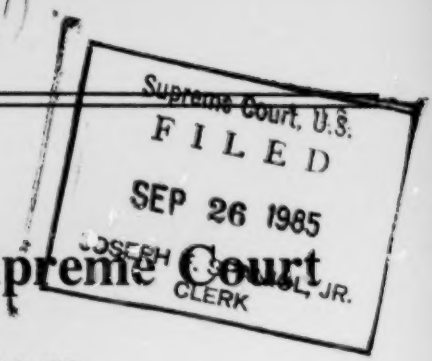

In the United States Supreme Court

PRESLEY RAY FULLER

Plaintiff - Petitioner

VS.

UNITED STATES OF AMERICA
THE UNITED STATES POSTAL SERVICE
AND
DAVID MILLER, GARY P. MILES and RONALD PITTS,
INDIVIDUALLY

Defendants - Respondent

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In light of this Courts holding in Harlow v. Fitzgerald, 457 U.S. 800 (1982), may summary judgment be granted for defendants, when the only record evidence is self serving affidavits contending that the actions taken were within the outer perimeter of their employment capacity when the conduct complained of is both criminal and tortious in nature?

Does Harlow v. Fitzgerald, 457 U.S. 800 (1982) require that a federal employee, seeking damages against his employer, couch his complaint in strictly constitutional terms as required by the trial court in the case at bar?

PARTIES TO THE PROCEEDING

The Petitioner is PRESLEY RAY FULLER, a tenured and currently unemployed postal employee.

The Respondents are DAVID MILLER, GARY P. MILES and RONALD PITTS, management employees for the United States Postal Service; the UNITED STATES OF AMERICA and the UNITED STATES POSTAL SERVICE.

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OPINIONS BELOW

On June 28, 1985, the United States Court of Appeals for the Eleventh Circuit issued a per currium affirmance of Case No. 85-5158. The affirmance was without opinion and was not published.

The Eleventh Circuit's Per Currium affirmance was from an order granting Final Summary Judgment issued on January 12, 1984 by the Honorable Jose A. Gonzalez, United States District Court Judge, Southern District of Florida. The opinion of Judge Gonzalez is likewise unreported.

JURISDICTIONAL STATEMENT

This petition seeks a review of the decision of the United States Court of Appeals for the Eleventh Circuit entered June 28, 1985. The affirmance was without opinion and unpublished. Petitioner then filed this timely Petition for Certiorari.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1346(b)

Subject to the provisions of Chapter 171 of this title, the district courts, together with United States District Court for the District of the Canal Zone and the District Court of the Virgin Island, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting in the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

This cause arose on Plaintiff's Amended Complaint filed in the United States District Court, Southern District of Florida. Plaintiff, Petitioner herein, PRESLEY RAY FULLER was a veteran postal employee working out of the Okeechobee, Florida Station. Petitioner was also employed as a Union Shop Stewart with the National Association of Letter Carriers. Petitioner's Complaint alleges that the Petitioner was an active stewart who filed numerous grievances during his tenure. Petitioner alleges that as a result of the filing of numerous grievances, Petitioner incurred the enmity of his superiors, to wit; managerial postal employees DAVID MILLER, GARY MILES and RONALD PITTS, the individual Defendants herein. Plaintiff further alleges that as a result of his conscientious work as a union shop

steward, the individual defendants did combine and conspire against him and did in fact remove Petitioner from his job.

The Respondents conspiracy began when the Petitioner received numerous complaints from postal customers on his route that part-time flexible carriers [PTF's] were delivering the mail in an excessively expedited and sloppy manner during Petitioners day off. Petitioner also discerned that the PTF's were driving at a hazardous rate of speed endangering both postal employees and the public at large. In order to aid the PTFs in performing their function effectively and safely, Petitioner put time slips in the mail slots at various points along the route. The purpose of the time slips was to notify the PTFs that they should be at a designated location on or about a certain time, based upon plaintiffs vast experience in running this route. Respondents MILES and

MILLER did discover the existence of the time slips. MILES and MILLER subsequently utilized the time slips to fabricate a disciplinary action against the Petitioner. The Respondents alleged that the Petitioner utilized the time slips in an attempt to solicit his fellow letter carriers to engage in an unlawful work slow down. There was no evidence to support this claim.

Petitioner had also alleged in his compliant that in an attempt to bolster their action against Petitioner, the Respondents did coerce and intimidate the PTFs into signing false affidavits against the Petitioner supporting Respondents charge. It has also been alleged that the Respondents did intentionally fabricate and falsify letters of discipline against the

Petitioner. [1]/ The spurious letter of reprimand bore the signature of a long retired postal supervisor. It has been further alleged that at subsequent hearings on the matter and under oath, the Respondents did affirmatively state that the letters of discipline were correct and that the affidavits had not been coerced. Petitioner was subequently discharged from his employment with the postal service. At a hearing the postal service. At a hearing before an impartial arbitrator, it subsequently was determined that the affidavits were wholly fallacious and that

1/ Under the postal services system of progressive discipline it is noted that an employee must have received a certain number of disciplinary actions within a prescribed time frame in order to be discharged. The defendants MILES and MILLER did fabricate these letters to estiblish the requisite disciplinary history.

the charges against the Petitioner were spurious, of suspect motivation, and amounted to an outright series of lies. The initial position taken by the PTF's, suborned by the Respondents, was subsequently recanted by them. Petitioner was subsequently ordered reinstated after seven months of unemployment. Subsequently the Petitioner was again discharged by the same Respondents. Predicated upon the aforementioned facts, the Petitioner filed the instant amended complaint seeking damages for tortious interference with Petitioner's employment relationship against the individual Respondents, for slander per se against the individual Respondents and for conspiracy against the Respondents MILES, MILLER and the UNITED STATES POSTAL SERVICE as well as the UNITED STATES OF AMERICA. In response to the Petitioners amended complaint, the Respondents filed a motion to dimiss or in

the alternative for summary judgment. The Respondents motion made the bald assertion the defendants were entitled to absolute immunity because their actions were within the course and scope of their employment. These assertions were unsupported by any other documentation in the record. In response, Petitioner contended that pursuant to this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed. 2d 369, 102 S.Ct. 2727 (1982), the Respondents were not entitled to absolute immunity, nor were their actions protected. The trial court granted the Respondents motion for summary judgment while holding initially that the defandants were subject to qualified immunity. Petitioner filed a motion for reconsideration which was subsequently denied by the trial court. The trial court for, reasons unstated in the order, subseqently held that the Respondents were entitled to

absolute immunity. The case was subsequently heard before the United States Court of Appeals for the Eleventh Circuit and was affirmed without opinion. It is from the aforementioned Per Curium affirmance that the petitioner appeals to this court.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for Certiorari based on the substantial questions involved. This case raises issues of great national importance never addressed by this court. In light of this courts ruling in Harlow v. Fitzgerald, supra, it is inconceivable that a management level federal employee may be entitled to absolute immunity based solely on self serving affidavits contending that the actions taken were within the outer perimeter of his employment. In reaching its decision, the trial court, citing Bush v. Lucas, 103 S.Ct. 2404 (1983), determined that absolute immunity should be accorded management level employees regardless of whether the allegations, as yet unrefuted, state that the actions complained of have effected the employee outside of the employment relationship. Moreover, until the decision by the District Court, no court,

with the exception of this court in Dred Scott v. Sanford, 60 U.S. 19 HOW. 393 (1857), has ever held that a class of persons is wholly beyond the constitution.

I

IN LIGHT OF THIS COURT'S RULING IN HARLOW V. FITZGERALD THE RESPONDENTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BASED ON SELF-SERVING ASSERTIONS THAT THEIR ACTIONS, BOTH TORTIOUS AND CRIMINAL IN NATURE, WERE WITHIN THE OUTER PERIMETER OF THEIR EMPLOYMENT CAPACITY.

Summary judgment may only be granted where, inter alia, the pleadings and affidavits show that there are no material issues of fact in dispute and the movant is entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. All evidence is construed in the light most favorable to the non-moving party and against the moving party. Sweat v. Miller Brewery Company, 708 F.2d 655 (11th Cir. 1983). In the case at bar, the trial court improvidently granted summary judgment for the individual defendants even after determining that the government officials

were only entitled to a qualified immunity. Plaintiffs had substantially defeated the governmental officials qualified immunity by showing that their conduct violated constitutional and statutory rights of which a reasonable person knew or should have known. Harlow v. Fitzgerald 457 U.S. 800 73 L.Ed. 2d 396, 102 S. Ct. 2727 (1982).

Plaintiffs amended complaint shows the defendants "fabricated and falsified letters of discipline against plaintiff . . . and coercively used their supervising authority to suborn several of plaintiff fellow employees to commit perjury against plaintiff". This is confirmed by plaintiffs sworn affidavit filed in opposition to the motion for summary judgment. Petitioner's affidavit further shows that Respondents actions were done "for the purpose of depriving [Fuller of his] job and [his] good reputation and defendants knew or should

have known these actions were unlawful". Construing this evidence in the light most favorable to Petitioner, the evidence clearly shows that the Respondents are not entitled to a qualified immunity based upon the standards enunciated in Harlow v. Fitzgerald wherein this court, per Justice Powell stated:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [emphasis supplied]

In the case at bar, the trial court committed two errors. Initially, the court has failed to heed the Supreme Court's mandate in Harlow by simply accepting the Respondents bald and unsupported affidavits claiming

that the individuals were performing discretionary functions within the scope of their employment and were immune from suit. Secondly, the trial court has misinterpreted Harlow as requiring that the Petitioner file a complaint couched in exclusively constitutional terms. It is clear that Harlow does not purport to establish a new rule of pleading but rather concerns a rule of substantive law. As such, the Petitioners complaint, clearly sounding in a constitutional deprivation, has stated a valid cause of action.

The Supreme Courts holding in Harlow could not be more plain; if an official knows or should have known that his actions are wrong, that individual will be held accountable for his actions. This holding could not be more prudent. However the ruling of the trial court has completely ignored the mandate of this Court. The

trial courts ruling has, in effect, stated that the defendants could not have known that perjury is violative of the law. 2/ Respondents themselves made false statements under oath. The trial court has also condoned the suborination of perjury as utilized in this conspiracy in derogation of Petitioners rights. Respondents secured the fallacious affidavits of the replacement letter carriers. Finally, and wholly without basis, the trial court has held that the manufacturing of false letters of reprimand is not conduct which an individual should know is wrongful and unlawful. This holding cannot stand.

2/ Florida Statute Section 775.082 provides that perjury and subornation of perjury are felonies in the third degree punishable by a term in prison not to exceed five years and a fine not to exceed Five Thousand Dollars on each count.

As this court clearly stated in Harlow:

> By defining the limits of qualified immunity in essentially objective terms, we provide no license to lawless conduct. Public interest in deterance of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an officials acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. Harlow supra at 411.

Under such clear language, the threshold test then becomes; should the Respondents have known that perjury, subornation of perjury, the manufacture of false letters of reprimand and the intentional abuse of administrative process are actions that reasonable individuals would or should know are violative of known statutory or

constitutional rights? Clearly, the question seems almost rhetorical. It does not require a legal scholar to ascertain that perjury and subornation of perjury are wrong. Every school child knows that the giving of a false oath is a breach of conduct untolerated in every jurisdiction in this nation. Moreover, these acts not only sought to chill Petitioners constitutional rights to free speech and association but by virtue of the conspiracy and slander had a detrimental effect outside of the employment setting as well.

In response to the Petitioners contentions, the defendants below make the incredible assertion that even if the Petitioners contentions were true as stated, the Respondents are entitled to immunity by reason of the fact that their actions are ministerial and nondiscretionary. In essence, the Respondents would have this

court accept that perjury is a ministerial function for postal service officials. The Respondents proffer that subornation of perjury and manufacturing of false evidence are nondiscretionary actions required and within the scope of their employment. While it would be intriguing to probe just how deeply the United States Postal Service requires felonious conduct on the part of its officials, the argument must be dismissed in its infancy as wholly unfounded and absurd. Nowhere in the in the postal manual is it required that postal officials break the law of the State of Florida or of the United States. That would be unlawful in itself. The actions of these defendants were taken maliciously and with personal conspiratorial motivation.

It is plain that the defendants characterization of their actions as ministerial and within the scope of their

employment is based upon this Court's clarification of those situations in which the defendant will be entitled to immunity. Butz v. Economou, 438 U.S. 478 98 S.Ct. 2894, 57 L.Ed. 2d 895 (1978), Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct 1683, 40 L.Ed. 2d 90 (1974). Petitioner does not question the bases cited within the framework of those cases as valid for granting immunity. Courts must grant protection to official who are merely seeking to perform the functions that they were hired and assigned to perform. To do otherwise would lead to chaos and a plethora of vexatious civil actions. Plainly, our government cannot exist under such circumstances. However, it is absolutely plain that such immunity was not meant to be granted in the case at bar. The Petitioners cause of action for the egregious wrongs committed by the Respondents against him cannot be defeated by the Respondents

self serving and bald contentions that they were acting within the scope of their employment. This type of "guilty with impunity" defense has long been dismissed in the Eleventh Circuit.

In Espanola Way Corporation v. Mironson, 690 F.2d 827 (11th Cir. 1982), the court held

> Aside from affirmatively asserting the defense, the defendants must prove that their acts fall within the scope of discretionary authority . . . the bald assertion that the acts were taken pursuant to the performance of their duties and within the scope of their duties will not suffice. Espanola supra at 830.

Furthermore, the Eleventh Circuit has already considered and dismissed the contention that the hiring and firing of a tenured employee is, per se, a nondiscretionary ministerial function.

Moreover, the discretionary function immunity exception is not one which has been

facilely granted by the courts. This Court in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed., 1427 as modified by Indian Towing Company v. United States, 350 U.S. 61, (1955) and Rayonier, Inc. v. United States, 352 U.S.(1957) has accepted the position that the government and its agents will be liable for the negligent performance of governmental activities if a private party would be liable had it undertaken the same activity. The absolute bar that the courts have established pursuant to 28 U.S.C. Section 2680(a) concerns those functions relating directly to the formation of government policy. This is not the case in the instant action. The outrageous actions undertaken by the individual defendants can in no way be considered subject to the immunity of the discretionary test proffered by the Respondents.

As the former fifth circuit stated in Smith v. United States, 375 F.2d 243 (5th Cir. 1967), "If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, federal courts must reject an absolutist interpretation of Dalhite and that interpretation is rejected by Indian Towing and especially by Rayonier. . ." Plainly, the courts of the Eleventh Circuit have continuously struck down attempts by defendants to hide behind a discretionary immunity sheild without a clear and convincing showing that the actions taken by those defendants are unequivocaly mandated and necessitated by reason of their position with the government. Patten v. United States, 636 F.2d 132 (5th Cir. 1981). In the case at bar, the Respondents position is likewise untenable. It can in no way be

accepted that the outrageous and illegal actions consciously undertaken by the individual defendants injure Petitioner were taken within the scope of the authority delegated to them by the United States Postal Service. The United States Government cannot and does not condone perjury.

Moreover, the trial court has seriously misconstrued the Supreme Court's ruling in Harlow as a rule of procedure, rather than of substantive law. Such a holding cannot withstand the test of scrutiny. The Supreme Court's intent under Harlow is clear; if an individual knows or reasonably should know that his actions violate the lawful rights of an individual or if the government officials take this action with malicious intention, the individual will be held accountable in the courts of the United States. Harlow, citing Wood v. Strickland, 420 U.S. 308, 43 L.Ed. 2d. 214, 95 S.Ct. 992 (1975). The

trial court has narrowly construed the Supreme Courts protection of rights in Harlow and has ignored the body, soul and thrust of the Supreme Courts opinion. Harlow does not require that a cause of action be couched solely in constitutional terms. Nor does Harlow require that in order to survive a motion to dismiss, a plaintiff can only enter a federal court under 42 U.S.C. Section 1983. Harlow plainly holds that the courts will protect both the constitutional and statutory rights of any individual litigants. Plainly then, Petitioner has a right to maintain this action. This is particularly apparent in light of the fact that Congress is seen fit to enact the Federal Tort Claims Act. 28 U.S.C. Section 1364.

The Federal Tort Claims Act plainly confurs liability on the United States and its agents ". . . under circumstances where

the United States and private persons, would be liable for the action in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1304(b), 2674, Richards v. United States, 369 U.S. 1, 82 S.Ct. 385, 7 L.Ed. 2nd 492. The test established for maintaining an action sounding in tort is clear. Plaintiffs action must survive a motion to dismiss if the acts alleged constituted a wrong under applicable state law. Doyle v. United States, 530 F.Supp. 1278 (D.C.D.C. 1982). In the case at bar, plaintiff has claimed a cause of action against the United States and the individual defendants under a conspiracy theory among others. The laws of the State of Florida have long recognized conspiracy as an actionable wrong. Faulk v. Allen, 152 Fla. 413, 12 So.2d 109 (Fla. 1943). Since conspiracy has not been specifically excepted by 28 U.S.C. 2680, the Plaintiff may

bring an action against the United States and its agents pursuant to the Tort Claims Act. It is abundently clear that the plaintiff has sufficiently plead facts to maintain a cause of actions under statute against United States and its agents.

However, even if this court were to accept the eviscerated version of Harlow as held by the trial court, it is clear the that Petitioner's complaint does state numerous instances of constitutional deprivations. Petitioner is a tenured public employee whose job has been wrongfully taken from him for his actions as a vocal union shop steward. Case law is legion in citing such as actions is being a constitutional deprivation. Burt v. Board of Trustees of Edgefield County School District, 78-20880 (4th Cir. 1978), Thurston v. Dekle, 578 F.2d 1167 (5th Cir. 1978), Garcia v. Daniel, 490 F.2d (7th Cir. 1972), Bell v. Gayle, 384 F. Supp. 1102

(N.D. Tex.), Cox v. Northern Virginia Transportation Commission, 551 F.2d 550 (4th Cir. 1976). Petitioner has been wrongfully terminated from his job, and deprived of his property rights. The Respondents have manufactored false evidence, attempted to submit the false evidence in an adversary proceeding, committed perjury in furtherance of their attempt to remove the Petitioner, induced suborinate employees to commit perjury in furtherance of the conspiracy to discharge and subsequently took the Petitioners job. Despite all this, the lower court has failed to recognize that there had been any actions taken by the Respondents which effect Petitioners constitutional rights. This certainly cannot stand.

As this Court states in Harlow "We provide no license to lawless conduct. Public interest in deterrence of unlawful conduct and in compensation of victims

remains to be protected by a legal test that focuses on the objective reasonableness of an officials acts." Harlow at 396. Clearly then, this is the thrust of Harlow.

Harlow does not require that every litigant couch his complaint exclusively in the language of the constitution of the United States. The purpose of Harlow is to permit courts to cut through "artful pleadings" and to terminate vexatious and meritless litigation in an early stage. The court must consider all the record evidence before it in considering the Respondents motion for summary judgment. The facts before the trial court do not show vexatious litigation brought merely for the purpose of revenge. This case demonstrates blatant abuse of public trust by three individuals and the usurpation of PRESLEY RAY FULLERS most cherished rights; the right to work, the right to free speech and the right to freely

associate with his fellow workers. Those are fundamental constitutional rights. Under such circumstances, it is unconscionable that a court could consider the claims of PRESLEY RAY FULLER to be insubstantial or meritless. The court has considered only two facts; the fact that the plaintiff has not filed an action under 42 U.S.C. Section 1983 [which he cannot as a federal employee, as opposed to a state employee] and the self serving affidavits of the defendants. Under such circumstances the granting of summary judgment is error.

The trial court has also erred in offhandedly dismissing the appellants claim as a "misplaced" Bivens claim. 3/ This Court in Bivens unequivocably stated that a

3/ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 39 L.Ed 2d 619 (1971).

citizen who had a constitutionally protected interest assailed by a federal agent may invoke federal jurisdiction against the federal agent. This position was supported again by the Supreme Court in Butz v. Economu, 438 U.S. 478 (1978).

While the trial court failed to state its basis for dismissing the Petitioner's "Bivens" complaint, it is assumed that the trial court utilized the special factors test enumerated in Bivens. A Bivens claim may be defeated when the case involves "special factors counseling hesitation in the absense of affirmative action by congress or when congress has instead granted another remedy to the aggrieved individual." Bivens supra.

Again, the trial court seems to completely ignore the substance of the Petitioners claim. The actions of the individual Respondents in depriving the

Petitioner of his job for exercising his first amendment rights could not be more plain. Under such circumstances it is abundently clear that the initial threshold, a constitutional deprivation, has been met by the Petitioner. The "affirmative action" by Congress is also apparent in the case at bar. Congress has seen fit to establish the Federal Tort Claims Act. Under the Federal Tort Claims Act it is uncontroverted that the Petitioner may maintain an action sounding in conspiracy against the United States, the United States Postal Service and the individual defendants. Congress has not excepted these causes of actions against respondents.

The Respondents are also estopped from claiming that the Petitioner has additional remedies which obviate the Petitioner's right to bring suit in the United States District Court.

Petitioner is currently out of work. The actions of the Respondents have effectively destroyed his ability to find gainful employment in the field in which he is trained. There are no other remedies available to the Petitioner. He shares the same basic right of every American. The Petitioner has a right to bring suit for damages in the United States District Court for the disgraceful and unlawful behavior of the Respondents as agents for this government. These Respondents are not above the law and must be held accountable for the is unlawful actions.

Moreover, the Tort Claims Act and Bivens has not been viewed as inconsistent by the courts. One authority has noted

> The legislative history of 28 U.S.C. Section 2680(a) which creates a cause of action against the United States for intentional torts committed by federal law enforcement officers,

indicates that Congress views the Federal Torts Claim Act and Bivens as parallel, complementary causes of action. In holding that the Federal Tort Claims Act was not intended to preempt the Bivens remedy or create an equally effective remedy for constitutional violations, the Supreme Court distinquished the two causes of action on the grounds that the Bivens remedy is a more effect deterient then the Federal Tort Claim Act remedy against the United States since it is recoverable against individuals and the Supreme Courts decision indicates that punitive damages may be awarded in Bivens suits whereas punitive damages in Federal Tort Claims Act actions are statutorily prohibited, a plaintiff has a right to a jury trial in a Bivens suit but cannot ask for a jury action under the Federal Tort Claims Act, and a Federal Tort Claims action exists only if the state in which the alleged misconduct occurred recognizes the cause of action for that misconduct with the liability of federal official for the violation of constitutional rights should be governed by

uniform fules. Civil actions against the United States Section 6.41.

Under these egregious circumstances, it is clear that liability extends to the United States of America and that the trial court erred in dismissing the claim against the United States and the United States Postal Service. Moreover, the correlation between a Bivens cause of action and those claims stated under 42 U.S.C. Section 1983 has long been accepted when a First Amendment violation has been claimed. Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976), Paton v. LaParde, 524 F.2d 862 (3d Cir. 1975). Clearly, under such circumstances, the court's requirement that the Petitioner exclusively frame his complaint in the language of 42 U.S.C. Section 1983 is error. The language in the Petitioners complaint in the allegations as stated are sufficient for jurisdication to vest in the District Court under Bivens.

In seeking to dismiss petitioners complaint the respondents have relied heavily on Barr v. Matteo, 360 U.S. 564 (1959). Petitioner contends that Barr is inapplicable to the instant action. In Barr, the Supreme Court held that absolute immunity was available to any federal official as long as the action of the official are "within the outer perimeter of [the officials] line of duties . . ." However, the actions alleged by Petitioner clearly do not fall within the outer perimeter of the individual respondents line of duty. The Respondents are postal officials whose duties include the supervision and management of a local postal service branch. It is manifest that within this line of duty the Respondents may do whatever actions are necessary to further the business of the United States Postal Service. These duties may arguably include management

functions including routing, personnel decisions and other related duties. However, these are not actions or duties challenged by petitioner in the case at bar. The Petitioners complaint alleges that the individual Respondents have committed criminal actions including numerous acts of perjury in furtherance of the attempt to deprive petitioner of his job and reputation. It is inconceivable that these egregious actions committed by respondents can in anyway be construed as within the outer perimeter of their line of duty. The acts alleged in furtherance of the conspiracy against Petitioner are ultra vires and in no way related to the "organizing and managing the operation of a large complex postal facility". While Respondent PITTS may be required to "take personnel action for all employees in the sectional center" and Respondent MILLER is obliged to "manage,

through suborinate supervisors, the operation of a medium to large size post office" the aforementioned duties cannot be construed as condoning the manufacture false letters of reprimand to effectuate their managerial duties. If this Court were to give credence to the bald assertions made by respondents, then plainly there is no limit to the actions which a government employee may take with absolute impunity. All the official need do is claim that the act, regardless of how outrageous, is within the scope of the official employment. This cannot be. Applying this courts holding in Harlow to the facts at case at bar the issue presented is simple; when individuals commit criminal acts, manufacture false letters of reprimand and knowingly, willfully and wrongfully seek to deprive a tenured federal employee of his job, is at reasonable for the federal managerial employee to claim that he does not

know that these acts are wrongful and they are not within the scope of his employment? Indeed, the question seems almost rhetorical. It is unequivocal that a federal employee may not act above the law merely by reason of the fact that he is a federal employee. Individuals, whether they are federal employees or not are held accountable for their actions when their actions violate known rights of citizens of the United States. The Constitution and the laws of the United States are not void within the halls of federal bureaucracy. The individual Respondents are not entitled to immunity for their actions.

Respondents have further agrued below that the petitioner should be denied his day in court by reason of the "elaborate remedial scheme" that exists to redress the petitioners allegations. However, petitioner steadsfastly contends that there is no other

redress available to him then an action in a court of competent jurisdiction. This is not merely an action to redress a wrongful removal. Even a cursory reading of the petitioners complaint demonstrates that this is an action to redress tortious and criminal conduct which has had repercussions beyond the scope of petitioners employment. Conspiracy and slander are not actions which effects an individual only in his employment capacity. Slander is an action which holds an individual up to potential ridicule and contempt in social as well as employment settings. It is actionable because it attaches to an individual a stigma which cannot be rectified in any manner other than retraction and compensation. It is odious conduct which impunes the very character of the individual against whom it is directed. It is conduct which exposes an individual to "hatred, contempt, ridicule, or obloquy, or

which causes or tend to cause a person to be shunned or avoided, which has a tendancy to injury any person, corporation or association in his or its business or occupation" Layne v. Tribune Company 108 Fla. 177 (1933) 86 ALR 466. The postal service and its "elaborate remedial system" offers no redress for these wrongs.

Respondents have further relied in this courts opinion in Bush v. Lucas 103 S. Ct. 2404 (1983) in support of its motion for summary judgment. Respondents reliance is misplaced in the case at bar. In Bush, this court sought to limit additional remedies under certain specifically delineated circumstances. This is not a case involving managements right to impose discipline. This court, in Bush sought to avoid a chilling effect upon a proper administration of managerial job functions. The court did not seek to limit all causes of

action merely by virtue of the fact that the plaintiff was an employee and the defendant a management level employer. This is a case involving malicious actions taken by individuals for strictly personal reasons. The actions of the respondents where in no way taken for the betterment of the United States Postal Service. The actions taken by Respondents are both tortious and criminal in nature. This type of action should be chilled and detered. Moreover, petitioner again contends that this is not a case which can be rectified by positive findings of an arbitrator. This case must be remedied by a finding of a jury in the United States District Court.

CONCLUSION

WHEREFORE for the aforementioned reasons the Petitioner respectfully prays this Honorable Court for an Order granting Certiorari.

VASSALLO, PHETERSON &

SACK, P.A.

for

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARILYN G. KOONCE, Assistant United States Attorney, LINDA COLLINS HERTZ, Chief, Appellate Division, EDWARD F. WARD, JR., Assistant General Counsel, STANLEY MARCUS UNITED STATES ATTORNEY, Attorney for Appellee, 155 South Miami Avenue, Miami, Florida 33130-1693 and ERIC J. SCHARF, Attorney, Office of Labor Law, United States Postal Service, Washington, D.C. 20260-1133, by mail, this 26th day of September, 1985.

PAUL A. SACK, ESQUIRE

I. JEFFREY PHETERSON, ESQUIRE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 83-8241-CIV-GONZALEZ

PRESLEY RAY FULLER,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

_____/

O R D E R

THIS CAUSE arises out of Plaintiff's discharge from his position as an employee of the United States Postal Service. After an arbitrator ordered Plaintiff reinstated, Plaintiff brought this action against the UNITED STATES OF AMERICA, the UNITED STATES POSTAL SERVICE, and DAVID MILLER, GARY P. MILES, and RONALD PITTS, individually, alleging tortious interference with Plaintiff's employment relationship, slander

per se, and conspiracy. Amended Complaint (filed Oct. 7, 1983). The UNITED STATES POSTAL SERVICE subsequently filed a motion to dimiss, or in the alternative for summary judgment. This latter motion now is considered by the Court.

1. Subject Matter Jurisdiction: In Count III of the Amended Complaint, Plaintiff charges all Defendants with conspiracy to discharge him from employment. Plaintiff cites Zerilli v. Evening News Association, 628 F.2d 217 (D.C. Cir. 1980) in support of his position that a conspiracy claim of this sort is actionable against the United States and the United States Postal Service. The Court finds Zerilli inapposite, and relies instead on the Fifth Circuit's holding in Radford v. United States, 264 F.2d 709, 710 (5th Cir. 1959), that the Federal Tort Claims Act does not subject the Unites States to a claim for damages allegedly resulting from a

conspiracy by officers or agents of the United States charged with the duty of making employment decisions. The Radford decision has been cited with approval by other courts. See Payton v. United States, 468 F. Supp. 651, 653-54 (S.D. Ala. 1979). The discretionary function exception of the Federal Tort Claims Act applies to suits against the United States Postal Service because section 409 of Title 39, United States Code so directs. Subsection (c) provides: "The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." Accordingly, the conspiracy charge against the United States and the United States Postal Service in count III be and the same is hereby DISMISSED.

2. Immunity: Having dispensed with the claim against the United States and the

United States Postal Service, all that remains are actions against the individual Defendants for tortious interference with an employment relationship, slander per se, and conspiracy. The Court finds that these charges also should be dismissed because the individual Defendants are immune from suit, and because the charges lack merit.

The question posed here is whether the individual Defendants are subject to absolute or qualified immunity. The Defendants' suggest that they are subject to absolute immunity from suit under Barr v. Mateo, 360 U.S. 564 (1959). The Plaintiff counters that the absolute immunity standard established in Barr has been modified by the Supreme Court in Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982). The Court is in substantial agreement with Plaintiff's position.

Harlow makes clear that the immunity granted in a federal official is a function

of the person's status, the impact that a cause of action would have on the performance of his duties, and the likelihood of frivolous lawsuits against the official. 102 S. Ct. at 2732-35; see Nixon v. Fitzgerald, 102 S. Ct. 2690, 2700 (1982).

Taking into account these factors, it appears that postmasters and postal supervisors are subject to qualified immunity. Absolute immunity has been reserved only for those officials whose positions involve especially sensitive duties, notably judges and prosecutor. See Supreme Court of Virginia v. Virginia Consumers Union, 446 U.S. 719, 731-37, 100 S. Ct. 1967, 1974-77, 64 L.Ed. 2d 641 (1980); Imbler v. Pachtman, 424 U.S. 409, 430-31, 96 S. Ct. 984, 994-95, 47 L. Ed. 2d 128 (1973). But even in those cases, absolute immunity applies only when the official is engaged in the activity that is deemed worthy

of absolute protection, e.g., prosecutor trying a case or a judge presiding. The range of duties for which absolute immunity applies is a narrow one. Thus, courts of appeal generally have ruled that prosecutors do not enjoy absolute immunity for acts taken while serving as an administrator or investigator. See Mancini v. Lester, 630 F.2d 990, 992 (3d Cir. 1980).

Under Harlow, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102 S. Ct. at 2738. Plaintiff does not charge Defendants with violating any statutorily- or constitutionally-protected rights; he does charge them with violations under common law. The Defendants have alleged, however, that

they were discharging a protected discretionary function when performing the act for which liability is asserted. Complaint paragraphs 20-23, 33 (filed Oct. 7, 1983); Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment, at 3-4 (filed Nov. 18, 1983). Extending the Harlow test to the facts here, and applying the rule of Spalding v. Vilas, 161 U.S. 483 (1896) and Barr v. Mateo, 360 U.S. 564 (1959) (in which federal officials, including Postmaster General of the United States, were held not susceptible to suit based on similar common law actions even if they acted with malice), it follows that individual Defendants here are shielded from liability for the wrongs alleged. Plaintiff's suit is one of those "insubstantial lawsuits" that the Harlow Court directs should be "terminated by federal courts alert to the possibilities of

artful pleadings." 102 S. Ct. at 2733. At best, the facts alleged suggest that Plaintiff is seeking revenge against Defendants for their having imporoperly discharged him earlier. Such suits are not worthy of consideration by this Court. Accordingly, the remaining counts against the individual Defendants be and the same are hereby DISMISSED.

Plaintiff's case is DISMISSED in toto as against the UNITED STATES OF AMERICA, the UNITED STATES POSTAL SERVICE, and DAVID MILLER, GARY P. MILES, and RONALD PITTS, individually.

DONE AND ORDERED in chambers at Fort Lauderdale, this 12th day of January, 1984.

UNITED STATES DISTRICT JUDGE

cc: counsel for record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 83-8241-CIV-GONZALEZ

PRESLEY RAY FULLER,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

_____/

O R D E R

THIS CAUSE has come before the Court upon the plaintiff's motion for reconsideration of the Court's order dated January 12, 1984, dismissing plaintiff's action against defendants. The Court has considered the motion, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that the motion for reconsideration of the Court's order

dismissing plaintiff's action be and the same is hereby DENIED. The Court finds that the individual defendants share absolute immunity from plaintiff's common law claims. See Barr v. Mateo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). Although defendants are entitled to qualified immunity from constitutional causes of action, Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974), said immunity never is at issue because plaintiff fails to state a claim for relief under 42 U.S.C. Section 1983,* and because plaintiff's action, if construed as a Bivens-type claim, is barred by Bush v. Lucas, 103 S. Ct. 2404 (1983), and Gleason v. Malcom, 718 F.2d 1044 (11th Cir. 1983).

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 27th day of March, 1984.

UNITED STATES DISTRICT JUDGE

cc: counsel of record

*No state action is alleged.

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

NO. 85-5158
Non-Argument Calendar

D.C. Docket No. 83-8241

PRESLEY RAY FULLER,

Plaintiff-Appellant,

versus

UNITED STATES POSTAL
SERVICE, DAVID MILLER,
GARY P. MILES and
RONALD PITTS, individually,

Defendants-Appellees.

Appeal from the United States
District Court for the
Southern District of Florida

(June 28, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant.

Judgment Entered: June 28, 1985
For the Court: Spencer D. Mercer,
Clerk

By:_____
Deputy Clerk